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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 291

EQUITABLE LIFE INSURANCE COMPANY OF IOWA,

Petitioner,

vs.

HALSEY, STUART & CO., A CORPORATION,

Respondent.

ANSWER OF HALSEY, STUART & CO., RESPONDENT, TO THE PETITION OF EQUITABLE LIFE INSURANCE COMPANY OF IOWA FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

List of Authorities.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner brought an action in deceit against respondent based upon alleged false representations and concealment of material facts in connection with the sale to petitioner in 1930 of several lots of bonds issued by various improvement districts of the City of Longview, Washington. The claimed misrepresentations were two statements contained in a general description of "Longview" in an offering circular which had been put out by respondent at the time of the original issuance and sale

of the bonds in 1927 and an excerpt from a letter written by respondent's sales manager for the Iowa territory to petitioner's Vice President on May 14, 1930. The only alleged concealment claimed by petitioner was the failure of respondent to advise petitioner of certain facts coming to its knowledge regarding the financial condition of The Long-Bell Lumber Company, the guarantor of the bonds, which it was charged reflected upon the financial soundness of that company.

Without passing upon the numerous errors alleged in the admission of evidence, the instructions to the jury, and in the total failure of proof on the issue of damages, the Circuit Court of Appeals found that the proof failed to establish the essential elements of an action for deceit, either for false representations or for fraudulent concealment, and reversed and remanded the case to the District Court for a new trial. In so deciding that the case should never have been submitted to the jury, the Circuit Court of Appeals applied the Iowa law defining the elements which must be established to make out a case of either false representation or fraudulent concealment. No question is raised here as to the accuracy of the Circuit Court of Appeals' statement of the requisites of an action for deceit as announced by the decisions of the Supreme Court of Iowa. The sole questions presented, therefore, are factual.

Since the decision of the Circuit Court of Appeals was rested wholly on the facts, it is obvious that the determination of an important question of local law in a way probably in conflict with applicable local decisions is not involved. This was fully recognized by counsel for petitioner as late as July 1, 1940, when they filed a petition in the Circuit Court of Appeals in which they stated (Tr. 699-700):

"On April 27, 1940 this court entered its opinion

and order reversing the judgment of the court below, and that the *sole ground* for reversal discussed in the opinion is the insufficiency of the evidence to support the verdict." (Italics ours.)

The Circuit Court of Appeals merely applied the well settled Iowa law governing deceit actions to the facts in the instant case and distinguished the Iowa cases relied upon by petitioner upon the facts of each of those cases. No controlling, much less important, question of Iowa law was involved in the Circuit Court of Appeals decision.

It is equally clear that the decision of the Seventh Circuit does not involve a conflict with the decision of another Circuit Court of Appeals on the same matter. Resting, as this decision does, wholly on the facts, such a conflict is not possible. Moreover, it is difficult to understand how a decision involving only questions of Iowa law, and where, under the doctrine of *Erie R. R.* v. *Tompkins,* 304 U. S. 65, the Iowa law is controlling, could involve a conflict with the decision of another Circuit Court of Appeals.

The only other possible suggested special and important reason for this Court taking the case is that the Circuit Court of Appeals, because it reviewed the facts and concluded that petitioner had not established its alleged action for deceit, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The mere statement of the proposition that a Circuit Court of Appeals may not examine the facts in a law action and find that they do not sustain the plaintiff's alleged cause of action, without thereby departing from the accepted course of judicial proceedings, carries its own refutation. It was the right and duty of the Circuit Court of Appeals, in view of the errors assigned, to examine the evidence and pass upon its legal sufficiency to sustain petitioner's amended complaint.

This Court has repeatedly held that the granting of a writ of certiorari is not warranted merely to review the evidence or inferences drawn from it.

General Talking Pictures v. *Western Electric Co.*, 304 U. S. 175, 178.

Federal Trade Commission v. *American Tobacco Co.*, 274 U. S. 543, 544.

United States v. *Johnston*, 268 U. S. 220, 227.

Southern Power Co. v. *N. Car. Public Service Co.*, 263 U. S. 508.

Houston Oil Co., etc. v. *Goodrich*, 245 U. S. 440, 441.

A re-review of the evidence by this Court is what petitioner seeks. Unless this Court takes a different view of the facts than did the Circuit Court of Appeals, no question is presented for review for, as petitioner's counsel correctly state (Tr. 700), "The sole ground for reversal discussed in the opinion is the insufficiency of the evidence to support the verdict".

For the reasons thus briefly indicated, we respectfully submit that the petition should be denied.

Should this Court deem it necessary, however, in passing upon the reasons urged by petitioner for allowance of the writ, to consider the evidence in more detail, we respectfully refer the Court to the statement of the case made by the Circuit Court in its opinion (Tr. 657-673). Recognizing as it does (Tr. 672) that all conflicts must be resolved in favor of the jury's finding, the Circuit Court of Appeals has stated the facts in the light most favorable to petitioner. Indeed, some of the statements made and inferences drawn in petitioner's favor go further, we believe, than is justified by the record.

To give this Court a somewhat fuller picture of the facts, we append a statement supplemental to that contained in the Court's opinion, embracing some material facts which were before the Circuit Court of Appeals but are not adverted to in its opinion.

Supplemental Statement of Facts.

A. The Long-Bell Lumber Company was one of the largest, if not the largest, lumber manufacturing companies in the United States (Tr. 346). The stock of The Long-Bell Lumber Corporation, the holding company, was listed on the New York Stock Exchange and quarterly consolidated earnings statements were filed with the Exchange and made available to the public generally. The earnings reflected in these statements were reported in the financial journals and newspapers (Tr. 145, 355).

B. Halsey, Stuart & Co. was named as fiscal agent for The Long-Bell Lumber Company in only one of the issues of bonds which Halsey, Stuart & Co. marketed. This was the issue of $3,250,000 of bonds of the Longview, Portland & Oregon Railroad Company (Plff's Ex. B-4, Tr. 421-31). All that Halsey, Stuart & Co. did as such fiscal agent under this bond issue was to collect the interest coupons at maturity and pay the same over to the holders thereof (Tr. 97).

C. Halsey, Stuart & Co., before purchasing the Local Improvement Districts Bonds of the City of Longview, insisted that the bonds be unconditionally guaranteed as to both principal and interest by The Long-Bell Lumber Company (Tr. 74, 82, 120, Plff's Ex. P-34).

D. The last bonds of the three issues of Longview Local Improvement Bonds which Halsey, Stuart & Co. purchased and offered for sale in 1925, 1926 and 1927 had been sold by the early part of *1928* (Tr. 84, 340). Halsey,

Stuart & Co. maintained a trading department through which it purchased and resold bonds of its own origination as well as bonds originated by others (Tr. 99). *All of the Local Improvement Bonds sold to the petitioner* were acquired by Halsey, Stuart & Co. for its own account (Tr. 99-100) in relatively small lots, from investors, financial institutions and dealers during the period from October 9, 1929 to December 8, 1930, at prices only a point or two below the prices at which the bonds were resold to the petitioner (Tr. 373-4, 617-19), except with respect to one lot of bonds purchased on October 9, 1930 where, due to special circumstances (Tr. 287-8), Halsey, Stuart & Co. was able to purchase the bonds at 89 (Tr. 617). Moreover, Halsey, Stuart & Co. continued to buy these bonds, for its own account and with its own money, well into the year 1931 (Tr. 100, 166).

All bonds available for sale through Halsey, Stuart & Co.'s trading department were shown on a weekly printed list of bonds on hand referred to as "Bonds on Hand" list, which it furnished to its several branch offices and salesmen, supplemented by daily advices indicating the bonds still available for sale (Tr. 296). It was from this "Bonds on Hand" list for May 3, 1930 (Deft's Ex. 19, Tr. 574) that Mr. Kelley, Halsey, Stuart & Co.'s salesman in Des Moines, Iowa, discovered the existence of $85,000 Longview Local Improvement Districts Bonds on hand available for sale and, in one of his calls on Mr. Hubbell, Vice President of the petitioner, directed his attention to these bonds (Tr. 296).

E. At the time Kelley called Mr. Hubbell's attention to the $85,000 of Local Improvement Districts Bonds available for sale, he gave him a copy of the original bond circular dated April 7, 1927 (Plff's Ex. B-1, Tr. 410), explaining that the circular was not current but one used in selling the original issue some three years prior to that time (Tr. 296). Mr. Hubbell requested information as to the

amount of bonds in each issue which had been retired, some general information as to the Local Improvement District laws of the State of Washington, and concerning the City of Longview, and specifically asked for the annual report of The Long-Bell Lumber Company for the year ending December 31, 1929 (Tr. 296-7, 316). None of this information was in Kelley's possession. He had never sold Longview Local Improvement Districts Bonds before and his sole knowledge of the issue was confined to the information contained in the original circular (Tr. 314). He accordingly asked his home office to supply the requested data (Tr. 314, 297). Kelley received from his home office and turned over to Mr. Hubbell a digest of the Washington Local Improvement District laws (Deft's Ex. 2), a printed copy of the annual report of The Long-Bell Lumber Company and subsidiaries for the year ended December 31, 1929 (Plff's Ex. B-34, Tr. 468), and a package of documents taken directly from the buying file of Halsey, Stuart & Co. containing the various showings which Halsey, Stuart & Co. had obtained from The Long-Bell Lumber Company in connection with the original purchase of the Longview Local Improvement Districts Bonds (Tr. 341).

F. The respondent was but one of fifteen investment houses from which the Equitable Life Insurance Company was purchasing securities in 1930 (Tr. 186). Mr. Hubbell was an experienced bond buyer. He had been buying special assessment bonds, as well as other types of municipals, for many years prior to 1930 (Tr. 188) and was acting for a company that then held more than $20,000,000 of bonds in its portfolio (Tr. 186, Deft's Ex. 1).

G. The information as to the City of Longview embodied in the bond circulars and the balance sheet figures there contained were all obtained by Halsey, Stuart & Co. from The Long-Bell Lumber Company (Tr. 337-40). Each

bond circular was submitted to The Long-Bell Lumber Company for its approval, and the description of "Longview" contained in the particular circular which was delivered to Mr. Hubbell was dictated by the advertising manager for The Long-Bell Lumber Company (Tr. 339, 615). The statement in the circular describing Longview was also examined by the general counsel for The Long-Bell Lumber Company, Mr. Jesse Andrews, who had visited Longview almost every month from 1923 to 1930 (Tr. 362). He regarded the statement as both proper and accurate (Tr. 356).

H. The statement made by Mr. Wood of Halsey, Stuart & Co. in his letter of May 14, 1930, offering to exchange $100,000 of the Longview bonds for $100,000 of Louisiana Highway bonds (Plff's Ex. B-24, Tr. 466), to the effect that "We believe you have before you practically all of the data covering this issue of bonds", referred to all of the material which had been sent to Kelley for transmission to Mr. Hubbell, including Halsey, Stuart & Co.'s buying file (Tr. 332). The sending of Halsey, Stuart & Co.'s buying file to the purchaser was unusual. "To that extent we went very much further in the matter of furnishing information than would be customary and usual in such a sale" (Tr. 331). Wood testifies that he did not consciously withhold from the Equitable Life Insurance Company of Iowa any information in his possession relative to the Longview Local Improvement Districts Bonds or The Long-Bell Lumber Company (Tr. 332).

I. Petitioner purchased from Halsey, Stuart & Co. a total of $353,000 Longview Local Improvement Districts Bonds. At the time of the trial, petitioner's holdings had been reduced to $266,000 through the payment and retirement of bonds by the several districts (Tr. 617). At the time of trial, interest had been paid on all of the bond issues in full up to and including April 1, 1936, and on

some of the issues to as late as February 5, 1938 (Tr. 623). Petitioner had received a total of $130,337.34 by way of interest on its bonds (Tr. 491).

J. Mr. Hubbell, Vice President of the Equitable Life Insurance Company of Iowa, admits that by the middle of 1931 he was fully advised as to all the facts regarding Longview and The Long-Bell Lumber Company which the complaint alleges respondent fraudulently and maliciously misrepresented or failed to disclose prior to the sale of the bonds (Tr. 201). No complaint was made by the Equitable to Halsey, Stuart & Co. that any facts had been misrepresented to the Equitable or withheld from it (Tr. 308-9, 201) until August, 1934, shortly before the institution of this suit and approximately three years after all of the information was in Mr. Hubbell's possession (Tr. 379-80). The Equitable continued to buy securities from Halsey, Stuart & Co. after the Vice President of the Equitable admits all the facts regarding the bonds were fully known to him. During 1931 Kelley sold the Equitable $1,561,000 of bonds, during 1932 $201,000, during 1933 $104,000, and in March, 1934 $50,000, or a total of approximately $2,000,000 (Tr. 305-6, Deft's Ex. 26, Tr. 612). Mr. Hubbell continued during 1931 and subsequent years to request of respondent additional information regarding the local improvement bond issues and the City of Longview (Tr. 308). Every request was fully complied with by respondent (Tr. 200).

K. Under date of November 11, 1931, Mr. Hubbell's assistant, Mr. Windsor, in a written memorandum to Mr. Hubbell, stated that a careful check of the correspondence and offering sheet of Halsey, Stuart & Co. in regard to the Local Improvement Districts Bonds "fails to disclose any misstatements on their part" (Plff's Ex. B-56, Tr. 493). No letters were ever written by the petitioner to Halsey, Stuart & Co. complaining or intimating that any misstate-

ments had been made or that any material facts had not been disclosed in connection with the sale of the bonds until August, 1934 (Tr. 379-80). Even then the petitioner made no claim that respondent had concealed or failed to disclose any facts or circumstances regarding Long-Bell's financial condition (Tr. 379-80).

L. At the beginning of the year 1930, The Long-Bell Lumber Company had assets in excess of $100,000,000, with $50,000,000 in surplus (Tr. 347-8). The financial officers of the company in 1930 made a forecast of earnings through the year 1931 which showed that, with no improvement in business, the company could go through the year without increasing its bank borrowings, paying all obligations as they matured (Tr. 352).

M. Mr. Hubbell, Vice President of petitioner, had numerous conferences with Halsey, Stuart & Co. from the Summer of 1933 through July of 1934, in regard to a reorganization of The Long-Bell Lumber Company and particularly of the Longview Local Improvement Districts Bonds (Tr. 378-9). Hubbell agreed to serve as one member of the committee representing the Local Improvement Districts Bonds (Tr. 379) and wrote several letters to the respondent tentatively agreeing to proposed plans of reorganization (Tr. 570-3). At no time during these extended negotiations did Mr. Hubbell ever claim that Halsey, Stuart & Co. had in any respect misrepresented the Longview Local Improvement Districts Bonds at the time of their sales to the Equitable (Tr. 379).

N. Eight months after this suit was brought, the Equitable was still carrying its Longview Local Improvement Districts Bonds on its books at 85% of their par value, and in its statement to policyholders for the year ending December 31, 1935 represented that it carried all of its investments at a conservative valuation and that the $272,000 par value of Longview bonds then held were worth $231,200 (Tr. 202, Deft's Ex. 8).

BRIEF IN SUPPORT OF ANSWER TO PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

The record is barren of proof that respondent had knowledge prior to the sale of the Local Improvement Districts Bonds to petitioner that the description of "Longview" contained in the original offering circular or in the printed literature prepared and distributed by The Long-Bell Lumber Company or its subsidiaries was in any respect inaccurate. For lack of this essential proof, the Circuit Court of Appeals properly found that the claim of false representations had not been sustained. Its decision would, of necessity, have been the same even if the offering circular had not contained the so-called "hedge clause". The statement of the Court that the "hedge clause" constituted a valid defense to the charge of misrepresentation, where, as in the instant case, the respondent had exercised great care and diligence in having the statements checked by The Long-Bell Lumber Company and was without knowledge of any inaccuracy, is sustained by the applicable authorities.

Readinger v. *Rorick*, 92 Fed. (2d) 140, (cert. den. 302 U. S. 758).

Saupe v. *St. Paul Trust Co.*, 170 Minn. 366, 212 N. W. 892.

II.

The record, as pointed out by the Circuit Court of Appeals, shows that respondent made no affirmative representations of any character regarding the financial condition of The Long-Bell Lumber Company, other than to furnish petitioner with the exact and accurate information which it requested. There is no basis, therefore, for the application of the doctrine of half-truths and the Circuit Court of Appeals properly so decided.

Gamet v. *Haas,* 165 Ia. 565, 146 N. W. 465, 466.

Benedict v. *Hall,* 201 Ia. 488, 207 N. W. 606, 607.

Wagner v. *Standard Seed Tester Co.,* 194 Ia. 1330, 191 N. W. 314, 315.

Palo Alto Stock Farm v. *Brooker,* 131 Ia. 229, 108 N. W. 307.

Boileau v. *Records & Breen,* 165 Ia. 134, 144 N. W. 336, 338.

Sherman v. *Harbin,* 25 Ia. 174, 100 N. W. 629, 631.

III.

The statement contained in Mr. Wood's letter of May 14, 1930, that: "You observe, of course, that this city has no funded debt, other than these improvement bonds and that the original debt has been materially reduced through retirement and maturity", cannot be tortured into meaning, as contended by petitioner, that there were outstanding no bonds of other municipal bodies which constituted a charge or lien upon the lands and property included within the various local improvement districts of the City of Longview. Moreover, the construction of an alleged written

misrepresentation, as well as the question of the materiality of such representation, are questions of law for the Court.

Baker v. *Mathew,* 137 Ia. 410, 115 N. W. 15.

Nat'l Bank of Pawnee v. *Hamilton,* 202 Ill. App. 516.

Rand v. *Michaud,* 122 Me. 65, 118 Atl. 893.

IV.

The Circuit Court of Appeals had no occasion to apply the rule of *caveat emptor* to the hypothetical state of facts set up in petitioner's Point IV. There is no evidence in this record that respondent by word or act did anything to lead petitioner to believe that the credit standing of The Long-Bell Lumber Company was in any respect different from what respondent knew or believed it to be.

Boileau v. *Records & Breen,* 165 Ia. 134, 144 N. W. 336.

Kohl v. *Lindley,* 39 Ill. 195, 201.

Sherman v. *Harbin,* 25 Ia. 174, 100 N. W. 629.

V.

No defense was predicated in this case upon the negligence of the petitioner in not discovering the facts which it is alleged were concealed from it. No such contention was made by the respondent nor did the Circuit Court of Appeals announce such a principle.

ARGUMENT.

Out of the Circuit Court of Appeals' opinion, which counsel for petitioner have stated under oath was predicated solely on the insufficiency of the evidence to support the verdict (Tr. 700), petitioner seeks, for the purpose of inducing this Court to review the case, to create some controlling questions of law. The effort is abortive and each question discussed by petitioner is found to depend wholly upon petitioner's interpretation of the facts, an interpretation which petitioner has already urged on the Circuit Court of Appeals without success. We will answer briefly the five points contained in petitioner's brief, none of which, incidentally, supports the six reasons urged upon this Court as a justification for the granting of a writ:

I.

The Record Is Barren of Proof That Respondent Had Knowledge Prior to the Sale of the Local Improvement Districts Bonds to Petitioner That the Description of "Longview" Contained in the Original Offering Circular or in the Printed Literature Prepared and Distributed by the Long-Bell Lumber Company or Its Subsidiaries Was in Any Respect Inaccurate. For Lack of This Essential Proof, the Circuit Court of Appeals Properly Found That the Claim of False Representations Had Not Been Sustained. Its Decision Would, of Necessity, Have Been the Same Even If the Offering Circular Had Not Contained the So-Called "Hedge Clause." The Statement of the Court That the "Hedge Clause" Constituted a Valid Defense to the Charge of Misrepresentation, Where, as in the Instant Case, the Respondent Had Exercised Great Care and Diligence in Having the Statements Checked by the Long-Bell Lumber Company and Was Without Knowledge of Any Inaccuracy, Is Sustained by the Applicable Authorities.

Petitioner again argues, as it did in the Circuit Court of Appeals, that the jury should have been allowed to *infer* knowledge by Halsey, Stuart & Co. as to the inaccuracy of the statement regarding Longview contained in the offering circular. Such an inference, it is argued, *could* be drawn from the fact that Halsey, Stuart & Co. prior to 1925 sold several large timber bond issues for the Long-Bell Company; that officers of the respondent were in Longview prior to 1925 and *could* have found out about the exact location of the city limits; and that early figures as to the assessed value of the real estate in the City of Longview *should* have warned Halsey, Stuart & Co. that the Long-Bell and Weyerhaeuser mills were not in the city proper.

The fallacy of these arguments is pointed out by the Circuit Court of Appeals in its opinion. At most, the facts relied upon give rise to mere *inferences.* They fall far short of that clear, convincing and satisfactory evidence by which the essential element of *knowledge* must be established. Moreover, the *inference* of knowledge which the petitioner seeks to impute to Halsey, Stuart & Co. is directly rebutted by the uncontradicted proof.

1. That Halsey, Stuart & Co. purchased the local improvement bonds solely in reliance upon the guaranty of The Long-Bell Lumber Company and made no attempt to ascertain or to describe in its offering circular the lands within the several districts, the improvements thereon or the values represented thereby (Tr. 80, 82, 411). There was no occasion, therefore, for Halsey, Stuart & Co. to determine, when it bought the bonds or when it sold them, the limits of the several districts or what properties were located therein.

2. That Halsey, Stuart & Co. in fact relied solely upon The Long-Bell Lumber Company to supply it with a description of Longview for the purposes of its bond circulars and the very description complained of was furnished to the respondent in writing by The Long-Bell Lumber Company and approved by its general counsel (Tr. 339, 356, 615, Deft's Exs. 33 & 33A). The representative of Halsey, Stuart & Co. who prepared the circular relied upon that information (Tr. 340). Neither he nor any person connected with the respondent, so far as the record discloses, had *knowledge* of any inaccuracy in Long-Bell's statement of the facts (Tr. 340).

The strange argument is advanced that respondent was guilty of making reckless statements when it turned over to petitioner the contents of respondent's original buying file containing the "showings" which respondent had collected and used in connection with its own purchase of the bonds (Tr. 338-9). These documents consisted of the sixteen page rotogravure paper (Plff's Ex. B-25) depicting scenes in Longview and surrounding territory put out by the Longview Company, an illustrated folder entitled

"Longview" put out by the Longview Chamber of Commerce (Plff's Ex. B-28), copy of the magazine "Longview Progress" (Plff's Ex. B-31), and copies of advertisements of Longview which the Long-Bell Company had carried in the Saturday Evening Post (Plff's Ex. B-26-7, B-29).* These printed documents, or some of them, contained references to the lumber plants of the Long-Bell *in* Longview, Washington.

On what theory respondent can be said to have been reckless in giving this original source material to the petitioner is not disclosed. Certainly respondent, having caused the statements in its own circular to be carefully checked by Long-Bell officers and its general counsel, had no reason to question the same description contained in Long-Bell's national advertising. Indeed, the only effect of the statements contained in the national advertising of Longview was to confirm in the mind of respondent the accuracy of the statements in the circular, which Long-Bell officials prepared and approved.

The Iowa cases cited by Petitioner, *Davis* v. *Central Land Co.*, 162 Ia. 269, 143 N. W. 1073, and *Haigh* v. *White Way Laundry Co.*, 164 Ia. 143, 145 N. W. 473, involving as they do "reckless assertion as true that of which the party knew nothing" or "asserting that to be true which was not true, which the defendant did not know to be true," have no application to the facts in the instant case where respondent admittedly checked every statement made by the most accurate available means.

The suggestion that Halsey, Stuart & Co., cannot now take advantage of the "hedge clause" because it relied primarily in its original purchase of the bonds on the Long-Bell guaranty is a complete *non sequitor*. The bond circular contained not only a description of Longview and

* All of these original exhibits were certified up to the Circuit Court of Appeals and do not appear in the transcript (Tr. 644).

its commercial development and possibilities, but contained the consolidated balance sheet of The Long-Bell Lumber Corporation and subsidiaries and a statement as to the company's net earnings (Plff's Ex. B-1, Tr. 410-13). Moreover, while Halsey, Stuart would not have purchased the bonds but for Long-Bell's guaranty, it relied upon the truth of *all facts* set out in the circular, as clearly appears from the testimony of Mr. Simond, who prepared the bond circulars (Tr. 338-40), and is borne out by the meticulous care with which these statements of fact in each circular were submitted to Long-Bell for approval and used only after such approval was obtained.

The importance of the "hedge clause" is that it called the buyer's attention to the fact that the information contained in the circular was being supplied by The Long-Bell Lumber Company and, while regarded as reliable by Halsey, Stuart & Co., was not guaranteed. Mr. Hubbell, as an experienced bond buyer, frankly admits that he "knew that it was the practice, and of necessity so, of investment houses in securing information regarding the properties of a company upon which securities were being issued to secure that information from the issuing company" (Tr. 188). That Halsey, Stuart & Co. believed all the statements made in the circular to be true is established by the testimony of those officials who had charge of the preparation of the bond circulars. The exact degree to which respondent relied in its original purchases upon each of the several facts appearing in the circulars is utterly immaterial.

The Circuit Court of Appeals was clearly right in the principle announced—that representations, qualified by the use of language indicating that they are based on information and belief, and which were honestly believed to be true, are not the basis for actionable fraud. The Circuit Court of Appeals for the Sixth Circuit, in a strikingly

similar case, recently so decided (*Readinger* v. *Rorick*, 92 Fed. (2d) 140, (cert. den. 302 U. S. 758)). See also *Saupe* v. *St. Paul Trust Co.*, 170 Minn. 366, 212 N. W. 892.

II.

The Record, as Pointed Out by the Circuit Court of Appeals, Shows That Respondent Made No Affirmative Representations of Any Character Regarding the Financial Condition of The Long-Bell Lumber Company, Other Than to Furnish Petitioner With the Exact and Accurate Information Which It Requested. There Is No Basis, Therefore, for the Application of the Doctrine of Half-Truths and the Circuit Court of Appeals Properly So Decided.

Admitting that the respondent was under no duty to voluntarily disclose further information coming to its possession regarding the financial condition of The Long-Bell Lumber Company, petitioner now asserts that Halsey, Stuart & Co. made affirmative misleading statements regarding Long-Bell and was, therefore, guilty of indulging in half-truths. The record, as the Circuit Court of Appeals points out in its opinion (Tr. 668-70), fails to disclose a single untrue or misleading statement regarding Long-Bell's financial condition. The premises upon which petitioner predicates its argument under Point II is wholly false.

Halsey, Stuart & Co. furnished to Mr. Hubbell exactly what he requested (Tr. 297, 315-16), which was "an annual report covering The Long-Bell Lumber Company's operations for the year ended 1929." That report was admittedly accurate and complete. Hubbell asked for no other or further financial data. No half-truth was spoken which could possibly give rise to a duty on respondent's part to make further disclosures.

Counsel refer to Mr. Wood's letter of May 14, 1930, in which, referring to the extensive data given to Mr. Hubbell before he purchased any of the local improvement districts bonds, Wood said, "We believe you have before you practically all the data covering this issue of bonds, but if you have any question in mind, we shall be pleased indeed to have you call Mr. Kelley or this office for anything you may need" (Tr. 466). To call this statement, which expressed, the evidence shows, Mr. Wood's sincere belief (Tr. 332) and which invited the petitioner to ask for anything that it wanted, a misleading statement of fact is patently absurd. The Circuit Court of Appeals answered this argument by the observation, "We think this cannot be construed as a deliberate attempt to throw appellee off its guard or mislead it into failing to pursue its inquiries further" (Tr. 670).

The attempt to find a misleading statement in Wood's letter of June 4, 1930 (Pltff's Ex. B-40, Tr. 483), is even more futile. What is false or misleading in the letter, petitioner wholly fails to point out. The statements of fact in the letter were accurate. That the sale of the Longview, Portland & Northern Railroad was a most favorable financial transaction for The Long-Bell Lumber Company was the unanimous judgment of everyone familiar with the sale (Tr. 353-4, 148).

The two cases referred to by petitioner, *Cable* v. *U. S. Life Insurance Co.*, 111 Fed. 19, and *Noble* v. *Renner*, 177 Ia. 509, 159 N. W. 214, were both cited to the Circuit Court of Appeals, and the Renner case was discussed and distinguished in the Court's opinion (Tr. 669). Neither authority has any application to the facts in the instant case. In the Cable case, which incidentally was reversed by this Court in 191 U. S. 288, a request for information as to the health of a potential insuree, was answered by the statement that the insured had been sick two or three

days but was no worse than he had been for forty-eight hours, when in fact the insured was, as the speaker well knew, seriously ill with acute pneumonia. This is the clearest sort of a case where a half-truth was spoken.

In *Noble* v. *Renner,* as the Circuit Court of Appeals points out, there was much more than mere silence on the part of the defendant. In that case, the plaintiff had under negotiation a contract for the purchase of land owned by the defendant adjoining the Missouri River. The river was cutting into the land. Plaintiff inspected the property and was apparently satisfied to take it in its then condition. Prior to the consummation of the contract of sale, however, conditions became very much worse and a substantial part of the farm was crumbling into the Missouri River. Despite the fact that the defendant was fully advised of this situation, he told the plaintiff before the contract was signed that "there was no cutting there any more; that there would be a little sloughing of the bank in the Spring when the frost was going out". This, of course, was a direct misrepresentation and the Iowa Supreme Court held that there was more than a mere case of silence, there was "affirmative concealment intended to lead another to his injury". It is obvious that the Circuit Court of Appeals was right in finding that the decision of that case had no application to the facts in the case at bar.

A.

Respondent was under no duty, after supplying petitioner with all the information requested regarding Long-Bell's financial condition, to voluntarily advise petitioner of subsequent events, which petitioner claims had a bearing upon the Long-Bell situation, particularly where the officers of respondent were of the opinion that such events did not in any respect impair the financial standing of the Long-Bell Company or affect the guaranty of the local improvement bonds.

This is not a case where, pending a sale of a certain property, the condition of the property changes and the vendor, by *affirmative acts*, conceals such changes from the buyer and thus deceives the buyer as to the true condition of the subject matter of the sale. Such was the case of *Noble* v. *Renner*, 177 Ia. 509, so strongly relied upon by petitioner, the inapplicability of which we have already pointed out.

So in *Loewer* v. *Harris*, 57 Fed. 368, the parties were negotiating for the sale of a brewery. The defendant furnished the plaintiff with a financial statement of the brewery dated August 31, 1890. This statement was given to the defendant at a meeting in January, 1891. At this meeting (p. 370)

> "* * * the plaintiff asked the defendant if the brewery was still doing as well, telling him that the capitalization of the corporation would be based on the earning capacity of the business, and, if the profits were not as good as they had been, he would not want anything to do with it. The defendant said the figures of the prospectus and report were correct, and that the business was showing a gradual increase the same as it had done previously."

After the contract between the plaintiff and the defend-

ant was signed in April, 1891, plaintiff learned that actually, from August 31, 1890, the business had not gradually increased, "but, on the contrary, had materially diminished". Thus there was present not merely the production of the financial report, but an affirmative false statement as to subsequent financial condition. The representation was not that the report was true as of August 31, 1890, but that the brewery had enjoyed a gradual increase in profit down to January, 1891, which representation the defendant knew to be false before the plaintiff acted upon it. This element of fraudulent representation, completely lacking in the instant case, is the basis for the decision in the *Loewer* case. As the court says, at p. 373, immediately following the portion cited by the petitioner:

> "The representation made by the defendant respecting the output and profits of the business, if made at all, was made in response to an inquiry of the plaintiff, coupled with the statement that he would not want to have anything to do with the transaction if the profits were not as good as they had been, and that the capitalization of the corporation would be based on the earning capacity of the business. The defendant understood that the inquiry and answer were addressed to the condition of things which might be relied upon by the plaintiff as the basis of the contract which was thereafter to be formally concluded."

The record in this case fails to show any affirmative act by Halsey, Stuart & Co. tending in the slightest degree to conceal any fact from the petitioner. As a matter of fact, the reports as to the current financial condition and current earnings of The Long-Bell Lumber Company were available to the world. Its quarterly statements were filed with the New York Stock Exchange and published in all the leading financial papers and periodicals and were, as the Circuit Court of Appeals found (Tr. 668), readily available to petitioner.

The other alleged changes in condition, which petitioner asserts should have been voluntarily communicated to it by Halsey, Stuart & Co., had to do with sales by Long-Bell of properties not necessary to its lumber business, and the organization in the Fall of 1930 of The Long-Bell Lumber Sales Corporation. Each of these sales, as well as the organization of the Sales Corporation, were regarded by the respondent's officials as only the steps which a well-managed corporation would take during a period of financial stress to put itself in a more liquid position (Tr. 100, 166), and in the opinion of the respondent's officers (Tr. 101, 167), as well as the officers of Long-Bell (Tr. 351-55), did not impair but, on the contrary, materially strengthened Long-Bell's financial position. That respondent's officers were sincere in this belief is demonstrated by the fact that throughout 1930 and well into 1931 respondent continued to purchase Long-Bell securities, including Longview Local Improvement Districts Bonds, with its own funds and for its own account (Tr. 100, 166). Even if a duty to voluntarily disclose facts regarding The Long-Bell Lumber Company's financial condition had rested on respondent, it was certainly under no duty to disclose those facts which, in the opinion of its officers, did not reflect adversely upon Long-Bell's ability to meet its obligations.

The Circuit Court of Appeals correctly applied the Iowa law to the facts in this case. Where there is no duty to disclose information in the possession of the vendor, failure to disclose imposes no liability upon him.

Gamet v. *Haas,* 165 Ia. 565, 146 N. W. 465, 466.

Benedict v. *Hall,* 201 Ia. 488, 207 N. W. 606, 607.

Wagner v. *Standard Seed Tester Co.,* 194 Ia. 1330, 191 N. W. 314, 315.

Fraudulent concealment is to be sharply distinguished from failure to disclose and is present only where an intention to deceive is established.

Palo Alto Stock Farm v. *Brooker,* 131 Ia. 229, 108 N. W. 307.

Boileau v. *Records & Breen,* 165 Ia. 134, 144 N. W. 336, 338.

Sherman v. *Harbin,* 25 Ia. 174, 100 N. W. 629, 631.

Since there is a total lack of proof that respondent intentionally concealed or wilfully covered up a single fact regarding Longview, the Improvement Districts bonds, or The Long-Bell Lumber Company, the instant case is in complete accord with the Iowa cases cited above.

III.

The Statement Contained in Mr. Wood's Letter of May 14, 1930, That: "You Observe, of Course, That This City Has No Funded Debt, Other Than These Improvement Bonds and That the Original Debt Has Been Materially Reduced Through Retirement and Maturity," Cannot Be Tortured Into Meaning, as Contended by Petitioner, That There Were Outstanding No Bonds of Other Municipal Bodies Which Constituted a Charge or Lien Upon the Lands and Property Included Within the Various Local Improvement Districts of the City of Longview. Moreover, the Construction of an Alleged Written Misrepresentation, as Well as the Question of the Materiality of Such Representation, Are Questions of Law for the Court.

The charge made by petitioner in its complaint is that defendant wilfully, maliciously, fraudulently and falsely represented to the plaintiff "that the City of Longview had

no funded debt other than the City of Longview Local Improvement Districts bonds, *which constituted a charge or lien upon the lands and property included within the various Local Improvement Districts of the City of Longview''* (Tr. 11). In short, petitioner asked the Court to add a complete sentence to Wood's simple statement and to give the letter a meaning which Wood obviously did not intend to convey, and which Hubbell does not even claim he attached to the statement (Tr. 172). Wood referred to only two possible classes of bonds—bonds of the City of Longview and bonds of the local improvement districts. He did not purport to state what the debt of the county, the school district or of any other municipal subdivision was.

The statements that Longview had no funded debt and that the local improvement districts bonds had been materially reduced through retirement and maturity were, concededly, correct (Tr. 334). Mr. Hubbell admits that before he bought a single Longview bond he knew that these bonds were not funded debts of the City of Longview (Tr. 193). What, then, was the misrepresentation?

Petitioner asserts that the statement in Wood's letter led Hubbell to believe that the bonds of the Cowlitz County Consolidated Diking District were not liens on lands within the City of Longview. The Diking District was a separate municipal corporation embracing a large tract of land between the Cowlitz and the Columbia Rivers, including a substantial part of the City of Longview (Tr. 117, Deft's Ex. 35 A-H, Plff's Ex. B-25). Its bonds were widely advertised and sold in 1925 (Tr. 84, 376). The audited report of The Long-Bell Lumber Company, furnished to petitioner before the purchase of any of the local improvement districts bonds, disclosed the amount of Diking District bonds outstanding, that they were guar-

anteed as to principal and interest by Long-Bell and had been issued to defray the cost of erecting the dikes, and that the bonds were liens against all lands within the district (Tr. 474).

Hubbell made no inquiry regarding these bonds because, as he admits, it was not the practice in the purchase and sale of municipal bonds until after 1932 or 1933, to make any inquiry as to the amounts or liens of overlapping municipal issues (Tr. 186-7). All of the other experienced municipal bond men who testified confirmed this statement (Tr. 307, 332). The question of the possible lien of the Diking District bonds on part of the lands within the City of Longview was, therefore, not in the minds of either the buyer or the seller, and Hubbell does not claim that it was (Tr. 172). The Circuit Court of Appeals was clearly right on the facts in finding no misrepresentation whatever in the last paragraph of Wood's letter of May 14, 1930.

Moreover, the construction of a claimed misrepresentation in a written document is a question for the Court. The Court should determine in a deceit action whether the plaintiff "had a right to rely and did rely" on the alleged written misrepresentations (*Baker* v. *Mathew*, 137 Ia. 410, 115 N. W. 15; *Nat'l Bank of Pawnee* v. *Hamilton*, 202 Ill. App. 516), and, of course, the materiality of such representations is likewise a question of law for the Court (*Rand* v. *Michaud*, 122 Me. 65, 118 Atl. 893).

The conclusion of the Circuit Court of Appeals (Tr. 668) that the claimed misrepresentation was immaterial, in view of the admitted fact that it did not and could not have misled the purchaser, is obviously sound.

IV.

The Circuit Court of Appeals Had No Occasion to Apply the Rule of Caveat Emptor to the Hypothetical State of Facts Set Up in Petitioner's Point IV. There Is No Evidence in This Record That Respondent by Word or Act Did Anything to Lead Petitioner to Believe That the Credit Standing of The Long-Bell Lumber Company Was in Any Respect Different From What Respondent Knew or Believed It to Be.

The petitioner, under its Point IV, states a purely hypothetical case and then cites some general authorities in support of such suppositious case. The evidence is uncontradicted that petitioner never asked for any credit information regarding the Long-Bell Lumber, other than the audited report of The Long-Bell Lumber Corporation and subsidiaries for the year ended December 31, 1929, and that no statements, oral or written, were ever made by respondent regarding Long-Bell's financial condition. It should be recalled that Mr. Hubbell's specific request was for the Long-Bell annual report for the year ending December 31, 1929. He asked for no other financial data (Tr. 297, 315-6). Hubbell admits that at all times, both prior and subsequent to the purchase of the bonds, Halsey, Stuart & Co. gave him everything that he asked for (Tr. 192). In fact, as soon as the Long-Bell's annual statement for 1930 was available, Halsey, Stuart & Co. voluntarily sent the petitioner a copy (Tr. 311, 545, Deft's Ex. 6).

The authorities relied upon by petitioner but serve to illustrate the sharp distinction on the facts between the instant and the hypothetical case which petitioner states in its heading.

In *Iasigi* v. *Brown*, 58 U. S. 183, the defendant affirmatively represented that the credit of one Thompson was

such that "in making sales to them now, no more than an ordinary business risk would be run" (p. 191). And later that "We continue to have a favorable opinion of the concern you allude to" (p. 191). As a matter of fact, defendant had at the time lost all confidence in Thompson and knew that all his property had been then transferred to defendant. This presents a clear case of a material affirmative representation known to be false when made.

Likewise, in *Thermoid Rubber Co.* v. *Bank of Greenwood,* 1 Fed. (2d) 891, the defendant, in answer to the plaintiff's inquiry as to the financial condition of a certain tire company, advised that it had loaned the company on its own paper, that the loans were satisfactory and had been materially reduced, and that it considered the company worthy of credit, all of which statements were known to defendant to be untrue.

Furthermore, as the Circuit Court of Appeals points out, both under the Iowa law and under the law generally, to establish fraudulent concealment, in the absence of the existence of a fiduciary relationship between the parties, there must be "the doing of some affirmative acts to prevent the other party from making adequate investigation to discover the true facts" (Tr. 669). This record is barren of such proof.

See:

Boileau v. *Records & Breen,* 165 Ia. 134, 144 N. W. 336.

Kohl v. *Lindley,* 39 Ill. 195, p. 201.

Sherman v. *Harbin,* 25 Ia. 174, 100 N. W. 629.

V.

No Defense Was Predicated in This Case Upon the Negligence of the Petitioner in Not Discerning the Facts Which It Alleges Were Concealed From It. No Such Contention Was Made by the Respondent Nor Did the Circuit Court of Appeals Announce Such a Principle.

In Point V petitioner sets up a straw man for the sheer pleasure of destroying it. The Iowa cases which are cited in the Summary of Argument (p. 22) all involve *affirmative misrepresentations* by the defendant.

The portions of the Circuit Court of Appeals opinion referred to at page 36 of the petition apply not to affirmative misrepresentations but to alleged failures to disclose. The emphasis is that the ease with which petitioner could have discovered the facts alleged to have been fraudulently concealed effectively negatives the idea of active, intentional concealment by the respondent.

There being no duty to disclose arising from any fiduciary relationship, the Court merely indicates that the requisite proof of fraudulent concealment is lacking. In connection with the financial condition of The Long-Bell Lumber Company, the Circuit Court of Appeals (Tr. 668) remarks upon the ease with which the facts alleged to have been concealed were available. "The only evidence of concealment was that further facts were not voluntarily disclosed." Since no duty to disclose existed, and no active concealment could even be inferred—in fact, all of the evidence was directly contrary—no liability could be predicated upon the alleged financial information not voluntarily disclosed.

The ease with which information as to the physical condition of the City of Longview could have been (and was

ultimately) acquired is mentioned also, merely as negativing any deliberate withholding (*i. e.*, active concealment) of information from petitioner. In fact, the record does not indicate that respondent knew any more about the physical situation in Longview than did the petitioner.

No "defense" to an alleged affirmative misrepresentation based upon the ease with which petitioner could have acquired the truth was ever asserted by respondent, and still less is any such "defense" established by the opinion.

What the Circuit Court of Appeals does decide is that "there was a failure of *evidence* to prove the concurrence of all the essential elements of an action for fraud" (Tr. 672). The application of the law of Iowa cannot be questioned—the sole issue was one of fact.

Conclusion.

All of the five points urged by petitioner were presented to the Circuit Court of Appeals by its petition for a rehearing in almost the identical language of this petition for writ of certiorari and supported by the same authorities. The petition for rehearing was denied.

Despite all the vituperation indulged in by petitioner, what this case exhibits is an attempt by a large and well-informed insurance company to shift onto the respondent, which acted at all times in the utmost good faith, the loss which general economic conditions produced. The very fact that no claim of either misrepresentation or concealment was made until more than three years after full discovery of all the facts and after The Long-Bell Lumber Company had sought relief under Section 77-B of the Bankruptcy Act, is indicative of lack of substantial merit in petitioner's claims. No facts were presented which indicated any possible grounds for the imposing of lia-

bility, and the Circuit Court of Appeals properly decided that this case never should have gone to the jury.

There being no grounds shown for the exercise of this Court's discretion, and the case having been properly decided, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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